IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs at Jackson February 5, 2008

STATE OF TENNESSEE v. JAMES BERNARD COX

Appeal from the Criminal Court for Davidson County
No. 2006-D-3002 Monte Watkins, Judge

No. M2007-01080-CCA-R3-CD - Filed May 14, 2008

The defendant, James Bernard Cox, pled guilty to rape, a Class B felony, and received an eight-year sentence of split confinement as a Range I offender, with seven years to be served on probation. He appeals the Davidson County Criminal Court's sentencing determination, arguing that the court did not give him pretrial credits, thus making his service in confinement greater than the statutory maximum of twelve months. The state agrees that the trial court erred in not granting pretrial jail credits. We also agree and reverse the trial court and remand the case for an amended judgment that includes pretrial jail credits.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Case Remanded

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Ross E. Alderman, District Public Defender, Jeffrey A. DeVasher (on appeal) and Laura Dykes (at trial), Assistant Public Defenders, for the appellant, James Bernard Cox.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Deborah M. Housel, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant was charged with rape, in violation of Tennessee Code Annotated section 39-13-503, and contributing to the delinquency of a minor, in violation of section 37-1-156. He reached a plea agreement with the state, whereby he pled guilty to the rape charge and received an agreed sentence of eight years, with the manner of service to be determined by the trial court. The second count of the indictment was dismissed. The defendant's rape conviction was based on the following facts, as related by the state at the plea submission hearing:

> [O]n June the 2nd, 2006, Officer Espinozo was dispatched to 100 Star Boulevard on a forcible sodomy call.
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> When he arrived at the scene he spoke with the seventeen year-old victim in this case . . . [w]ho stated that the . . . defendant, James Cox, was the father of a friend of his. He said that on June 1st, 2006 the defendant asked him to get in a car with him that was parked around the pool area of an apartment complex. Once inside the defendant gave him an alcoholic beverage. The defendant then drove to a Sonic, obtained some food. And, then, they went to Cedar Hill Park to watch a ball game. The victim fell asleep and when he woke up he discovered the defendant on top of him performing oral sex. The victim told the defendant that he needed to go home and the defendant did take him home.
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> Subsequently . . . the police officers did speak with the defendant. And he, the defendant, stated that he did put the victim's penis in his mouth for approximately a minute or so.

The trial court held a sentencing hearing, at which the victim and the victim's mother testified about the effects the crime had on the victim and asked that the defendant receive a jail sentence and counseling. The defendant's family members, including his mother, ex-wife, and son, testified that the crime was not reflective of the defendant's character, that the defendant's family relied on him for support, and that the defendant had a history of alcohol abuse that affected his behavior. At the close of the hearing, which took place on May 2, 2007, the trial court announced that it would order the defendant to serve one year in confinement, with the balance of his sentence on probation. The following colloquy then took place:

> [DEFENSE COUNSEL]: I'm sorry. I have questions, Your Honor, about this. My client has been in custody since July 13th. Do you mean he goes home July 12th of this year?
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> THE COURT: He goes home May 2, 2008.
>
> [DEFENSE COUNSEL]: It's not a legal sentence, Your Honor.
>
> THE COURT: Well, let the Court of Appeals take that up.

The court entered a judgment for the rape conviction reflecting the sentence of one year in confinement followed by seven years on probation, with probation to begin May 2, 2008. The judgment reflects no pretrial jail credits.

The defendant argues that the trial court erred in not granting him pretrial jail credits, which resulted in an illegal split confinement sentence. The state agrees with the defendant's position and asks us to remand the case to the trial court.

When a defendant appeals the manner of service of a sentence imposed by the trial court, this court generally conducts a de novo review of the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). However, the presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is on the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d), Sent'g Comm'n Cmts. This means if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The defendant in the present case does not contest the judgment of split confinement. Rather, he contests the trial court's denial of pretrial jail credits and the overall length of his confinement period. Relative to this, we note that Tennessee law requires a trial court to grant pretrial jail credits:

> The trial court shall, at the time the sentence is imposed and the defendant is committed to jail, the workhouse or the state penitentiary for imprisonment, render the judgment of the court so as to allow the defendant credit on the sentence for any period of time for which the defendant was committed and held in the city jail . . . or county jail or workhouse, pending arraignment and trial. The defendant shall also receive credit on the sentence for the time served in the jail, workhouse or penitentiary subsequent to any conviction arising out of the original offense for which the defendant was tried.

T.C.A. § 40-23-101(c). Moreover, our sentencing statute allows for split confinement sentences, as long as the portion of the sentence served in confinement does not exceed one year:

> A defendant receiving probation may be required to serve a portion of the sentence in continuous confinement for up to one (1) year in the local jail or workhouse, with probation for a period of time up to and including the statutory maximum time for the class of the conviction offense.

Id. § 40-35-306(a).

The record in the present case reflects, and the parties agree, that the defendant was in continuous confinement since July 13, 2006. The sentencing hearing took place on May 2, 2007.

The trial court erred in not granting pretrial jail credits for time the defendant had served in confinement up to that point. We agree with the defendant that the total amount of time the trial court ordered him to serve in confinement, including the time he had already served before imposition of the judgment, exceeded one year and, thus, violated the law.

We take note of the trial court's disregard of the law in this case that resulted in the defendant being confined for over nine months longer than the law allowed. Upon sentencing the defendant, the trial court was advised by defense counsel that the defendant had been in jail over nine months and that a sentence of confinement ending one year from the date of the sentencing hearing was contrary to the law. Still, the trial court sentenced the defendant in violation of the clear mandate of Code section 40-23-101(c) that a defendant be granted pretrial jail credits. Unfortunately, due to the trial court order and the timing of this case, the defendant has already served the extent of his illegal sentence of confinement. We expect such an error not to occur again. We also note that defense counsel could have filed a motion for an expedited appeal, which would have led to an earlier review from this court.

Based on the foregoing and the record on appeal, we reverse the judgment of the trial court and remand the case for an amended judgment reflecting the defendant's pretrial jail credits.

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JOSEPH M. TIPTON, PRESIDING JUDGE